

1807114 (Migration) [2020] AATA 550 (16 January 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1807114

MEMBER: Cathrine Burnett-Wake

DATE: 16 January 2020

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Statement made on 16 January 2020 at 12:43pm

CATCHWORDS

MIGRATION– cancellation– 457 (Temporary Work (Skilled)) visa – Federal Circuit Court remittal – applicant was no longer a member of the family unit of the primary applicant – relationship had ceased – inconsistent pieces of information to certain events –failed to respond to s359 letter – credibility concerns – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 116, 359, 360, 363, 375, 376
Migration Regulations 1994, rr 1.12, 1.15

CASES

Hasran v MIAC [2010] FCAFC 40
MIBP v Singh [2016] FCAFC 183

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 21 October 2015 made by a delegate of the Minister for Immigration and Border Protection to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116(1)(a) on the basis that the applicant was no longer a member of the family unit of the primary applicant, Ms [A]. The delegate found that as it appears the relationship had ceased, the circumstances which permitted the grant of the applicant's visa no longer existed.
3. The applicant lodged a merits review application with the Tribunal on 28 October 2015 to have the delegate's cancellation of the visa reviewed. The Tribunal affirmed the delegate's decision to cancel the applicant's subclass 457 visa on 21 June 2016.
4. The applicant lodged an application to the Federal Circuit Court (FCC) for judicial review of the Tribunal's decision and the matter was remitted to the Tribunal by consent on 14 March 2018.
5. The applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

Background: Years 2009 – 2017

7. The applicant and Ms [A] married in India [in] 2009. As per the Department of Immigration and Border Protection (the Department's) records Ms [A] was granted a student [visa], for the purpose of studying in Australia. The applicant was granted a student [visa], as a dependant/spouse of Ms [A], the primary visa holder. The couple arrived in Australia [in] July 2009. On [date] Ms [A] gave birth to their [child].
8. On 6 February 2013 Ms [A] was granted a subclass 457 visa, and so was the applicant on the basis that he was the spouse of Ms [A].

Cancellation at the Department:

9. As outlined, the applicant was granted his dependant subclass 457 visa on the basis that he was a member of Ms [A]'s family unit, as he was in a genuine and continuing relationship with the primary visa holder (Ms [A]).
10. On 8 October 2015 the Department notified the applicant of its intention to consider cancellation of the subclass 457 Visa as they had received information the relationship between him and Ms [A] had ended.
11. The applicant did not respond to the Department's notice regarding its intention to consider cancellation.
12. On 21 October 2015, notification of cancellation, and the decision record, was sent to the applicant on the grounds under s.116(1)(a) - fact/circumstance no longer exists.

First review at the Tribunal – Case Number 1514575

13. On 28 October 2015, the applicant lodged an application to review the decision to cancel his subclass 457 visa with the Tribunal.
14. Oral evidence was provided to the Tribunal on 10 March 2016 at a hearing from both the applicant and Ms [A]. The primary issue considered was whether the applicant is a member of the family unit of Ms [A], in particular whether the applicant is the spouse of Ms [A] at the time of cancellation. This would determine whether the grounds for cancellation under s.116(1)(a) had been made out.
15. The Tribunal considered the definition of member of the family unit in s.5(1) of the Act and r.1.12 of the Migration Regulations 1994 (the Regulations). This provides a person is a member of the family unit of another person (the family head) if the person is a spouse or de facto partner of the family head. To establish this the Tribunal also considered s.5F of the Act and r.1.15A of the Regulations.
16. Evidence was provided regarding all circumstances of the relationship, including evidence of the financial and social aspects and the nature of the applicant's and Ms [A]'s household and their commitment to each other.¹
17. On 21 June 2016 the previous presiding Member affirmed the decision to cancel the review applicant's subclass 457 visa. The first Tribunal review made findings that it was not satisfied that the applicant was the spouse, within the meaning of s.5F, of Ms [A] and the Tribunal was satisfied that there had been a material change in their relationship since the subclass 457 visa was granted. The Tribunal was satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.

FCC proceedings:

18. The applicant lodged an application for judicial review with the FCC of the Tribunal's decision [in] July 2017.
19. [In] March 2018 Judge [of] the FCC ordered by consent of the parties the application be remitted back to the Tribunal for reconsideration, and noted that:

[The Tribunal's decision] is affected by jurisdictional error. The [Tribunal] breached section 359A of the Migration Act 1958 (Cth) by failing to put information to the Applicant in accordance with s 359A or s 359AA. The information was allegations of family violence made against the Applicant which was relevant to the genuineness of the relationship between the Applicant and the sponsor and formed a reason, or part of the reason for affirming the decision under review. While the Tribunal attempted to put this information to the Applicant during the hearing in accordance with 359AA, it failed to advise the Applicant that he could seek additional time to comment on or respond to the information as mandated by s 359AA(1)(b)(iii) (refer to audio of hearing part 2:14:00-2:23:00). As s 359AA was not complied with, nor a letter in accordance with s 359A sent in relation to the information, a breach of s359A has occurred.

CONSIDERATION OF CLAIMS AND EVIDENCE

20. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(a). If satisfied that the ground for cancellation is made out, the

¹See 1514575 ff. 96-104.

decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Federal Circuit Court remittal review at the Tribunal – Case Number 1807114

21. On 27 March 2019, the Tribunal, pursuant to s.359(2) sent the applicant an invitation to provide further information to support his claims that he and Ms [A] are in a spouse or de facto relationship. This invitation was sent to the representative's listed email address, which is the last address provided in connection with the review.
22. The invitation also specifically stated that the Tribunal must receive the information/response, or any request for an extension of time in which to do so, by 10 April 2019, or the applicant would lose any entitlement he might otherwise have under the Act to appear before the Tribunal.
23. However, the applicant did not provide any comments or response within the prescribed period. Nor did the applicant, or their representative, request an extension of time within the prescribed period in which to do so.
24. On 11 November 2019, the Tribunal wrote to the applicant pursuant to s.359A of the Act and provided particulars of information that it considered at the time would be the reason, or part of the reason, for affirming the delegate's decision, and it invited the applicant to comment on or respond to the information. This invitation was sent to the representative's listed email address.
25. The invitation also specifically stated that the Tribunal must receive the comment/response, or any request for an extension of time in which to do so, by 25 November 2019, or the applicant would lose any entitlement he might otherwise have under the Act to appear before the Tribunal.
26. On 18 November 2019, the applicant called the Tribunal and spoke with a Member Support Officer. The applicant in this conversation outlined that he had received an email regarding an invitation to comment from the Tribunal which he did not understand. The Member Support Officer outlined that the letter sent to him was an invitation to comment on adverse information that may jeopardise his application or claims; however, the Tribunal could not provide advice about the letter or what he should do and he should seek advice from his migration agent.
27. However, the applicant did not provide any comments or response within the prescribed period. Nor did the applicant, or their representative, request an extension of time within the prescribed period in which to do so.
28. The Tribunal, for completeness, decided to send the applicant a second letter pursuant to s.359A and additionally provide the applicant with a copy of the s.375A certificate contained on the Department file for comment on its validity as it was not clear from the file if the Tribunal's obligations regarding the s.375A certificate had been fully discharged in the first review. Furthermore, the Tribunal was mindful that the applicant had called and stated that he had not understood the initial s.359A letter, so the Tribunal wanted to ensure he was afforded procedural fairness and given a further opportunity to address the matters raised under s.359A.
29. The Tribunal's second s.359A letter dated 19 December 2019 relevantly outlined:

I write firstly to inform you about a certificate issued pursuant to s.375A of the *Migration Act 1958* (the Act) which is on the Department's file.

Secondly, I write to inform you about potentially adverse information on the Department's file and conflicting evidence provided by [Ms A] during the hearing and invite you to comment on or respond to that information.

1. The certificate issued in accordance with s.375A. The Department's file contains certificate issued on 9 February 2016 in accordance with s.375A of the Act. A copy of the certificate is attached.

The certificate issued under s.375A of the Act states that a delegate of the Minister has determined that s.375A applies to any matter or information contained in folio(s) [as] disclosure contains sensitive information (family violence allegations) from a third party which if disclosed may cause issues to the source.

The Tribunal considers the certificate to be validly made.

If you wish to make any submissions concerning the certificate, including but not limited to its validity, please send your written submission to the Tribunal by 2 January 2019.

In accordance with the Full Federal Court decision in *MIBP v Singh* [2016] FCAFC 183, the Tribunal is required to balance its obligations under ss.375A and 376 with its obligations under s.359A of the Act, where it is possible to do so. Section 359A of the Act sets out a procedure for the Tribunal to inform applicants of potentially adverse information and invite them to comment on or respond to that information before the Tribunal makes a decision on their application.

Accordingly, this information, where relevant, is set out in section two, below.

2. Invitation to comment on or respond to information pursuant to s.359A

In conducting the review, we are required by the Act to invite you to comment on or respond to certain information which we consider would, subject to your comments or response, be the reason, or a part of the reason, for affirming the decision under review.

Please note, however, that we have not made up our mind about the information.

Background

On 6 February 2013 [Ms A] (the primary visa holder) was granted a 457 visa. You were subsequently granted a dependant 457 visa on the basis that you were a member of [Ms A]'s family unit.

On 21 October 2015 the Department of Home Affairs and Border Protection ("the Department") cancelled your visa on the basis that you were no longer in a relationship with [Ms A].

On 21 June 2016 the Tribunal affirmed the Department's decision to cancel your visa.

You appealed the Tribunal's decision to the Federal Circuit Court of Australia ("the Court"). By an Order [in] March 2018 the Court remitted the decision to the Tribunal for reconsideration citing a breach of ss 359A and 359AA of the Migration Act 1958 (Cth) ("the Act"). Specifically, the basis of this remittal was that the Tribunal made a jurisdictional error in failing to put information to you regarding allegations of family violence. These allegations were relevant to the genuine nature of your relationship with [Ms A]. At your hearing, the Tribunal did not advise you that you were able to seek additional time to comment or respond to this information, per s359AA(1)(b)(iii) of the Act.

The particulars of the information are:

Claims of Family Violence

- At the hearing on 10 March 2016 the Tribunal notified both you and [Ms A] that the Department received information from [Ms A] in September 2014 that there had been family violence.
- When this was put to [Ms A] at the hearing she confirmed that there were a 'few problems, not too many'.
- [Ms A] said you were aggressive and lonely after December 2014 when your [child] left for India.
- [Ms A] claims you lived apart for 3 months commencing on or around [September] 2015. She claimed she came back in December 2015. She claims the reason for the separation was because you drank a lot and were quite aggressive and abusive. She also claimed that the separation was mutually initiated by both of you.

This adverse information relates to whether your spousal relationship with [Ms A] no longer exists. This is because claims of family violence and separation may suggest your spousal relationship with [Ms A] no longer exists. Per s359A(1)(b) of the Act, in relying on this adverse information, subject to your comments, the Tribunal would affirm the decision under review.

Information Received from [Ms A]

- [Ms A] claims to have gone to India in January 2015 to see your [child] and to attend [a] wedding. This is relevant as you claimed that [Ms A] had not returned to India to see your [child].
- With respect to Christmas Day in 2015, [Ms A] claims to have gone to [a city]. This is relevant as your evidence was that the two of you went to [a] Plaza.
- With regard to the weekend prior to [date] March 2016, [Ms A]'s evidence was that you went to a friend's house and went shopping. This is relevant as you said that you stayed at home and watched movies and [sport]. On Saturday night of that weekend [Ms A] claims that you ate mutton and that she had fried rice. This is relevant as you said that you potentially ate meat.
- [Ms A] claims to have been working at [a workplace] since 2012 but had taken medical leave from [March] 2016. This is relevant as you claimed that [Ms A] was unemployed at the time of the hearing, and had been for several months.
- [Ms A] claimed that there were two other occupants of [Address 1] who were [Mr B] and [Mr C]. This is relevant because you gave evidence that the other occupant of [Address 1] was [Mr D].
- At the time of the hearing, [Ms A] claimed that the last time you spoke with your [child] was on Saturday or Sunday. This is relevant because you claimed that the last time you spoke with your [child] was the week prior.

This adverse information relates to whether the spousal relationship between you and [Ms A] no longer exists. You and [Ms A] have provided inconsistent pieces of information to certain events. This may cause the Tribunal to doubt the credibility of you and [Ms A]. Different accounts of events may cause the Tribunal to conclude the

spousal relationship between you and [Ms A] no longer exists. Per s359A(1)(b) of the Act, in relying on this adverse information, subject to your comments, the Tribunal would affirm the decision under review.

If we rely on this information in making our decision, we may find that your spousal relationship with [Ms A] no longer exists. This would mean that there no longer exists a particular fact or circumstance which permitted the grant of the visa. Using this and the Tribunal's discretionary powers would be the reason or part of the reason for affirming the decision.

30. The invitations sent to the applicant – the s.359(2) letter sent on 27 March 2019, and the s.359A letters sent on 11 November 2019 and on 19 December 2019 – were all sent to the last address provided in connection with the review and advised that, if the information/comments were not provided in writing by specified dates, the Tribunal may make a decision on the review without taking further steps to obtain the information/comments and the review applicant would lose any entitlement he might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments.
31. The review applicant has not provided the information or comments within the prescribed period and no extension has been granted. In these circumstances, s.359C applies and pursuant to s.360(3) the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that if a review applicant has no entitlement to a hearing, the Tribunal has no power to permit him or her to appear: *Hasran v MIAC* [2010] FCAFC 40. The Tribunal has decided to proceed to decision without taking further steps to obtain the information/comments as the applicant has not engaged with the Tribunal process, although given multiple opportunities to do so.
32. At the time of writing, no further information or comments have been received by the Tribunal.

Does the ground for cancellation exist?

Section 116(1)(a) - Fact or Circumstance for visa grant no longer exists

33. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.
34. As has been detailed above, the applicant did not provide information to the Tribunal within the prescribed time period; as such he was not entitled to appear before the Tribunal to give evidence and present arguments.
35. The Tribunal notes that had the applicant availed himself of the opportunity to provide further information within the prescribed timeframe to enable a hearing to proceed, the Tribunal would have provided the applicant with an opportunity to further ventilate the matters discussed above and as put to him in the s.359A letter.
36. As it stands, the Tribunal does not have any contemporary information before it regarding the spousal relationship between the applicant and Ms [A].
37. The Tribunal has cumulatively considered all of the evidence and information provided in relation to the matters prescribed under r.1.15A(3). The Tribunal accepts that in the past the applicant and Ms [A] were in a spousal relationship which resulted in a child between them.

38. However, as it stands the most recent evidence on file regarding the nature of the commitment, the nature of the household, the financial aspects and social aspects of the relationship between the applicant and Ms [A] is from the period from late 2014 until March 2016.² Further, the oral evidence provided during the first Tribunal hearing from both the applicant and Ms [A] contained inconsistencies that indicated the applicant was no longer living with Ms [A] or in a spousal relationship, these inconsistencies were put to the applicant in the s.359A letter (as outlined above) for comment; however, he has not responded.
39. The applicant has had three opportunities in this second review to provide information to the Tribunal about his relationship with Ms [A]. The applicant has not provided updated evidence that demonstrates he and Ms [A] are in a current and ongoing spousal relationship, nor has he addressed the inconsistencies as put to him that indicated he was no longer in a spousal relationship with Ms [A]. The Tribunal is therefore satisfied that the applicant and Ms [A] do not currently have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. They therefore do not meet the requirements of s.5F(2)(b) and s.5F(2)(c). In addition the Tribunal is satisfied that the parties are no longer living together and have been living separately and apart on a permanent basis. Accordingly the requirements of s.5F(2)(d) are not met.
40. Given the above findings the Tribunal is satisfied the applicant is no longer the spouse of Ms [A] within the meaning of s.5F. The Tribunal is therefore satisfied that there has been a material change in their relationship since the subclass 457 visa was granted. The Tribunal is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.
41. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

42. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
43. As the Tribunal has no contemporary information nor has the applicant put forward any consideration of discretion claims in his second review, the Tribunal turns its mind to what was previously submitted in regard to its consideration of discretion.

The purpose of the visa holder's travel and stay in Australia, whether the visa holder has a compelling need to travel to or remain in Australia.

44. The applicant's purpose of his travel and stay was on the basis he was the spouse of Ms [A]. As the Tribunal is satisfied that the applicant is no longer the spouse of Ms [A], the Tribunal does not consider it necessary that the applicant remain in Australia on a subclass 457 visa. The evidence before the Tribunal does not indicate the applicant has demonstrated a compelling need to travel or remain in Australia.
45. These factors weigh in favour of the visa being cancelled.

²See 1514575 ff. 96-104.

The extent of compliance with visa conditions

46. There is no evidence that the applicant has breached any conditions during his time in Australia. This weighs in favour of not exercising the discretion to cancel the visa.

Degree of hardship that may be caused (financial, psychological, emotional or other hardship)

47. During the hearing in the first review the applicant put forward that the visa cancellation would not be good for his [child] and that he wished for the family to remain together in Australia. The Tribunal notes that the last information it had regarding the applicant's [child] was the child had returned to India, as such the family was not all living together when this claim was made. The applicant has not provided any information to the contrary, even though he was given an opportunity to provide the Tribunal with updated information regarding his circumstances for its consideration. Notwithstanding this, as the Tribunal is satisfied that the applicant is no longer the spouse of Ms [A] and they are no longer living together as a family unit, the Tribunal does not accept hardship would occur if the applicant returned to India.
48. The Tribunal gives no weight to the hardship claims presented by the applicant in favour of exercising discretion to not cancel the visa.

Circumstances in which ground of cancellation arose

49. The ground of cancellation arose because of the material change in the spousal relationship between the applicant and Ms [A]. The Tribunal has therefore given this factor no weight in favour of or against cancellation and treats this consideration as neutral.

Past and present behaviour of the visa holder towards the department

50. The Tribunal has had regard to the applicant's conduct in relation to the Department. There is no evidence that the applicant has been uncooperative with the Department.
51. There is no evidence that the applicant has breached any conditions during his time in Australia. This weighs in favour of not exercising the discretion to cancel the visa.

Whether there would be consequential cancellations under s.140

52. The cancellation of the visa will not result in any consequential visa cancellation of any held visas of Ms [A] or the applicant's child. The Tribunal has therefore given this factor no weight in favour of or against cancellation.

Whether there are mandatory legal consequences

53. If the applicant's visa is cancelled, he would become an unlawful non-citizen and be liable to be detained under s.189 of the Act unless granted another visa. There is no suggestion that he would be detained indefinitely because as an Indian citizen there is no evidence he could not return to India. The Tribunal acknowledges that unless the applicant is granted another visa, he may be subject to possible removal from Australia and he may be subject to an exclusion period in relation to some future visa applications. Section 48 of the Act prevents a non-citizen who held a visa that was cancelled under s.116 from applying for any visa not prescribed for the purposes of s.48 while in the migration zone. Nevertheless, the Tribunal notes that these are the intended consequences of the legislation. The Tribunal has therefore given this factor no weight in favour of or against cancellation.

Whether any international obligations, including non-refoulement and best interests of the children as a primary consideration, would be breached as a result of the cancellation

54. In considering whether to exercise its discretion to cancel the applicant's visa, the policy guidelines suggest that the Tribunal should assess whether Australia would be in breach of its international obligations. These include the obligation in relation to non-refoulement pursuant to the Refugees Convention and the Refugees Protocol, Australia's responsibilities regarding the rights of any children pursuant to Article 3 of the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights.
55. There is no evidence before the Tribunal that would suggest that Australia would be in breach of its international obligations pursuant to any of these international agreements as a result of cancellation.
56. The Tribunal has considered and weighed up all of the relevant circumstances in this case. The Tribunal acknowledges that the applicant may experience hardship, including financial and emotional hardship, if the visa is cancelled. The Tribunal also accepts that the applicant, on the basis of the evidence before it, has generally complied with visa conditions and has been cooperative with the Department. While these circumstances weigh in favour of not exercising the discretion to cancel the visa, the Tribunal gives more weight to the fact that the main reason for the visa being granted to the applicant was because he was the spouse of Ms [A], which based on the evidence he no longer is. Additionally, the evidence before the Tribunal is the applicant's [child] is now in India and the applicant has no other reasons to remain in Australia, other than the economic conditions in India and he would be financially better off living and working in Australia.
57. Considering the circumstances as a whole, the Tribunal concludes that the visa should be cancelled.

DECISION

58. The Tribunal affirms the decision to cancel the applicant's Subclass 457 (Temporary Work (Skilled)) visa.

Cathrine Burnett-Wake
Member